Supreme Court, U.S.
FILED
OCT 24 2008
OFFICE OF THE CLERK

No. 08-372

IN THE
Supreme Court of the United States

SHELL OIL PRODUCTS COMPANY LLC, ET AL.,

Petitioners,

v.

MAC'S SHELL SERVICE, INC., ET AL.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE AMERICAN PETROLEUM INSTITUTE AS *AMICUS CURIAE* SUPPORTING PETITIONERS

HARRY M. NG
KRISTYN NOETH
American Petroleum Institute
1220 L St. N.W.
Washington, DC 20005
(202) 682-8000

ROBERT A. LONG, JR.
Counsel of Record
JONATHAN L. MARCUS
Covington & Burling LLP
1201 Pennsylvania Ave., NW
Washington, DC 20001
(202) 662-6000

October 2008

Counsel for Amicus Curiae

TABLE OF CONTENTS

Page

TABLE OF CONTENTS i

TABLE OF AUTHORITIES iii

INTEREST OF *AMICUS CURIAE* 1

STATEMENT 2

SUMMARY OF ARGUMENT 7

REASONS FOR GRANTING THE PETITION 10

I. Review Is Warranted To Restore The Uniformity Congress Sought To Establish By Enacting The PMPA 10

A. A Uniform Interpretation Of The PMPA Is Of Critical Importance To Franchisors 11

B. The Court Of Appeals' Decision Deepens A Circuit Conflict That Prevents The Attainment Of Uniformity 12

C. The Court Of Appeals' Decision Stands As An Impediment To Uniformity Because Under Its Approach The Viability Of A Cause Of Action Under The PMPA For Constructive Termination Depends On State Law 15

II. Review Is Warranted Because The PMPA Does Not Create A Cause Of Action For Constructive Termination 17

CONCLUSION 23

TABLE OF AUTHORITIES

Page(s)

CASES

Abrams Shell v. Shell Oil Co., 216 F. Supp. 2d 634 (S.D. Tex. 2002), *aff'd* 343 F.3d 482 20

Abrams Shell v. Shell Oil Co., 343 F.3d 482 (5th Cir. 2003) 14, 15

Air Safety, Inc. v. Teachers Realty Corp., 706 N.E.2d 882 (Ill. 1999) 16

April Marketing & Distributing Corp., Inc. v. Diamond Shamrock Refining and Marketing Co., 103 F.3d 28 (5th Cir. 1997) 14

Barnes v. Gulf Oil Corp., 795 F.2d 358 (4th Cir. 1986) 7, 12, 13

Bell Atlantic Corp. v. Twombly, 127 S. Ct. 1955 (2007) 2

Casserlie v. Shell Oil Co., 2007 WL. 1559510 (Ohio Ct. App. May 31, 2007), *appeal accepted for review*, No. 2007-1408, 876 N.E.2d 968 (Ohio Nov. 21, 2007) 16

Clark v. BP Oil Co., 137 F.3d 386 (6th Cir. 1998) 7, 13

Dersch Energies, Inc. v. Shell Oil Co., 314 F.3d 846 (7th Cir. 2002) 20, 21, 22

Hazara Enterprises, Inc. v. Motiva Enterprises, LLC, 126 F. Supp. 2d 1365 (S.D. Fla. 2000) 16

Leegin Creative Leather Products, Inc. v. PSKS, Inc., 127 S. Ct. 2705 (2007) 2

McGinnis v. Star Enterprise, 8 F.3d 20, 1993 WL 455587 (5th Cir. 1993) 14

Portland 76 Automobile/Truck Plaza, Inc. v. Union Oil Co. of Cal., 153 F.3d 938 (9th Cir. 1998) 8, 13, 14

Tangren Family Trust v. Tangren, 182 P.3d 326 (Utah 2008) 16

Texaco, Inc. v. Dagher, 547 U.S. 1 (2006) 2

Texaco, Inc. v. Hasbrouk, 496 U.S. 543 (1990) 2

STATUTES

Petroleum Marketing Practices Act, 15 U.S.C. §§ 2801-2806 ..... *passim*

15 U.S.C. § 2801(1) 3

15 U.S.C. § 2801(17) 3, 17

15 U.S.C. § 2802(b)(2) 3, 4, 18

15 U.S.C. § 2802(b)(3) 4

15 U.S.C. § 2803 19

15 U.S.C. § 2804 ..... 4, 18, 21

15 U.S.C. § 2805(a) 5, 6, 16, 19, 21

15 U.S.C. § 2805(c) 16

15 U.S.C. § 2806(a)(1) 3

OTHER AUTHORITIES

S. Rep. No. 731, 95th Cong., 2d Sess. (1978) ..... *passim*

INTEREST OF *AMICUS CURIAE*

This brief *amicus curiae* in support of petitioners Shell Oil Products Company LLC, Motiva Enterprises LLC, and Shell Oil Company, Inc., is filed on behalf of the American Petroleum Institute. ("API").[1] API is a non-profit District of Columbia corporation for the United States oil and natural gas industry. API's more than 400 members cover all facets of the industry, including exploration, production, transportation, refining, and marketing.

API's members have a significant interest in the issue in this case. The Petroleum Marketing Practices Act, 15 U.S.C. §§ 2801-2806 ("PMPA" or "the Act"), establishes federal standards for the termination or non-renewal by an oil refiner of a service station operator's franchise. The PMPA provides a cause of action against oil refiners that terminate a franchise or fail to renew it in a manner that does not comply with the statute. Thus, many of API's members are subject to suit under the Act.

This case presents the question whether a service station operator that continues to operate its franchise may nevertheless sue the franchisor for wrongful "termination" under the PMPA. The First

---

[1] Pursuant to Rule 37.6, *amicus* affirms that no counsel for a party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus*, its members, or its counsel made a monetary contribution to its preparation or submission. Pursuant to Rule 37.2, counsel of record for all parties received timely notice of *amicus*'s intention to file this brief. The parties have consented in writing to the filing of this brief.

Circuit held that a service station operator can maintain such a suit, but the text and structure of the statute make clear that the First Circuit erred in according the PMPA such broad scope. Because API members may be subjected to PMPA suits, they have a strong interest in having the statute confined to the circumstances to which Congress intended it to apply.

API frequently participates in legislative, administrative, and judicial proceedings that present issues of national concern, including issues arising under the PMPA.[2] API believes that its participation as *amicus curiae* in this case will offer the Court an industry-wide perspective on the question presented.

STATEMENT

1. Congress enacted the PMPA to establish "minimum federal standards governing the termination and nonrenewal of franchise relationships for the sale of motor fuel by the franchisor or supplier of such fuel." S. Rep. No. 731, 95th Cong., 2d Sess. (1978), at 15. Congress sought to displace "an uneven patchwork of [state] rules governing franchise relationships" with a "single, uniform set of rules governing the grounds for termination . . . and the notice which franchisors must provide franchisees prior to termination of a franchise." *Id.* at 19. To promote "certainty and

---

[2] *See, e.g., Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 127 S. Ct. 2705 (2007); *Bell Atl. Corp. v. Twombly*, 127 S. Ct. 1955 (2007); *Texaco, Inc. v. Dagher*, 547 U.S. 1 (2006); *Texaco, Inc. v. Hasbrouk*, 496 U.S. 543 (1990).

uniformity in franchise relationships which permeate a nationwide motor fuel distribution and marketing network," the PMPA "preempts state law in the subject areas in which the federal legislation deals, i.e., termination and non-renewal of franchise relationships and the notice applicable thereto" if the state law "is not the same as the applicable provision" of the PMPA. *Id.* at 16. *See* 15 U.S.C. § 2806(a)(1).

The PMPA defines a "franchise" to mean the use by a franchisee of "a trademark which is owned or controlled by" a refiner. 15 U.S.C. § 2801(1)(A). The term also includes the contract for the supply of motor fuel and the lease of the premises on which the motor fuel is sold. *Id.* § 2801(1)(B). Courts refer to these three components of the franchise as the "statutory element[s]" of the franchise. Pet. App. 18a. The PMPA also states that "the term 'termination' includes cancellation." 15 U.S.C. § 2801(17).

In setting federal standards for termination of a franchise, Congress attempted to "strike a balance between" (S. Rep. No. 731, at 15) franchisees' interest in avoiding "arbitrary or discriminatory termination" (*id.*) and franchisors' need for "adequate flexibility" to "initiate changes in their marketing activities to respond to changing market conditions and consumer preferences" (*id.* at 19). Concerned about franchisors "resort[ing] to termination of the franchise for the most technical or minor violations of the contract" (*id.* at 18), Congress enumerated the grounds on which the franchisor may lawfully terminate the franchise. *See* 15 U.S.C. § 2802(b)(2). Those grounds include a failure by the franchisee to

comply with a franchise provision that "is both reasonable and of material significance," *id.* § 2802(b)(2)(A); "[a] failure by the franchisee to exert good faith efforts to carry out" the franchise, *id.* § 2802(b)(2)(B); "[t]he occurrence of an event which is relevant to the franchise relationship" and which renders termination of the franchise "reasonable," *id.* § 2802(b)(2)(C); a written agreement between the franchisor and franchisee to terminate the franchise, *id.* § 2802(b)(2)(D); and a "determination made by the franchisor in good faith and in the normal course of business to withdraw from the marketing of motor fuel through retail outlets in the relevant geographic market," *id.* § 2802(b)(2)(E).[3]

Congress also sought to ensure that procedural regularity attends the termination process by imposing notification requirements on franchisors. *See* 15 U.S.C. § 2804. The PMPA requires that the franchisor notify the franchisee in writing of the date on which termination will take effect and the reasons for which the franchise is being terminated. *Id.* § 2804(c). That notice must generally be provided at least 90 days before the date termination "takes effect." *Id.* § 2804(a)(2).

The PMPA provides franchisees with a cause of action against a franchisor that fails to comply

---

[3] The listed grounds for termination are also grounds for non-renewal. Section 2802(b)(3) sets out additional grounds for non-renewal, including the failure of the parties "to agree to changes or additions to the provisions of the franchise" if the changes or additions "are the result of determinations made by the franchisor in good faith and in the normal course of business." 15 U.S.C. § 2802(b)(3)(A).

with the statute's provisions governing termination or non-renewal. 15 U.S.C. § 2805(a). It requires a court to grant a franchisee a preliminary injunction "to compel continuation or renewal of the franchise relationship" while the court considers the merits of the franchisee's challenge to the franchisor's termination or non-renewal, provided certain specified conditions are met. *Id.* § 2805(b). The franchisee need only establish "sufficiently serious questions going to the merits to make such questions a fair ground for litigation" and that the balance of hardships tips in its favor. *Id.* § 2805(b)(2). The statute authorizes prevailing franchisees to recover actual damages and, in cases involving "willful disregard" of the statute, punitive damages. *Id.* § 2805(d)(1)(A), (B). Finally, the court may award franchisees "reasonable attorney and expert witness fees" unless the franchisee recovers "only nominal damages." *Id.* § 2805(d)(1)(C).

2. Despite the fact that the PMPA by its terms applies only to "termination" or "non-renewal" of the franchise, respondents sued petitioners under the PMPA while continuing to operate their franchises on the theory that petitioners' elimination of a rent reduction program amounted to "constructive termination" of the franchise. Pet. App. 4a. The jury returned a verdict in respondents' favor, awarding them $1.3 million on their constructive termination claim, and the district court

added $1.16 million in attorney's fees and $209,000 in expert witness fees pursuant to the PMPA.[4]

3. The court of appeals affirmed the judgment on the constructive termination claim. Pet. App. 15a-21a. The court rejected petitioners' argument that a service station operator who continues to operate the franchise—that is, continues to use the refiner's trademark, to receive motor fuel, and to lease the premises—cannot claim that it was "terminated" within the meaning of the PMPA. *Id.* at 17a-18a. The court concluded that the PMPA, unlike other laws, does not "require an actual severance of the relationship." *Id.* at 18a. The court reasoned that "requiring a franchisee to go out of business before invoking the protections of the PMPA" would frustrate the "congressional plan." *Id.* Instead, the court recognized a cause of action for wrongful termination under the PMPA where a franchisee alleges that the franchisor breached one of the three statutorily protected contracts—the contract for use of the trademark, motor fuel, or the premises—and that the breach is "such a material change that it effectively ended the lease, even though the [franchisees] continued to operate the business." *Id.*

---

[4] The PMPA fee award applied to respondents' constructive termination claim and a constructive non-renewal claim on which they also prevailed. The constructive non-renewal finding was reversed on appeal because, while the court of appeals recognized a claim for constructive termination, it declined to "recognize a claim for nonrenewal under the PMPA where the franchisee has signed and operates under the renewal agreement complained of." Pet. App. 25a.

SUMMARY OF ARGUMENT

Recognizing that petroleum refiners operate and distribute their fuel on a nationwide scale, Congress enacted the PMPA to establish a uniform standard governing the termination and non-renewal of franchise relationships. That objective has not been realized, however, because the federal courts of appeals have issued conflicting decisions on the scope of the cause of action available to remedy wrongful termination. The court of appeals here held that a franchisee may sue a franchisor for wrongful termination under the PMPA even when the franchisor never terminates the franchise or notifies the franchisee of an intent to terminate the franchise. Under the court of appeals' approach, a franchisee need only allege that the franchisor breached a term pertaining to one of the three statutory elements of the franchise (the trademark use authorization, the contract for the supply of motor fuel, or the lease of the premises) and that the breach "effectively ended the lease, even though the [franchisee] continued to operate the business." Pet. App. 18a. In so holding, the court of appeals followed the Fourth Circuit's decision in *Barnes v. Gulf Oil Corp.*, 795 F.2d 358, 359 (4th Cir. 1986), which adopted a similarly expansive view of the cause of action available under the Act for wrongful "termination."

The Sixth Circuit, on the other hand, has held that a franchisor's breach of a statutory element of the franchise must be a total breach such that the franchisee loses use of the trademark, fuel supply, or the premises. *See Clark v. BP Oil Co.*, 137 F.3d 386, 389 (6th Cir. 1998). The Ninth Circuit has similarly

held that the franchisee at a minimum must be forced out of business to state a wrongful termination claim based on a breach of one of the three statutory elements. *See Portland 76 Auto/Truck Plaza, Inc. v. Union Oil Co. of Cal.*, 153 F.3d 938, 942 (9th Cir. 1998). These conflicting decisions merit this Court's review because they defeat one of the key purposes of the Act—to establish a uniform, national standard for the termination of a petroleum franchise.

In addition to the circuit conflict, the court of appeals' decision undermines the congressional goal of a uniform approach to petroleum franchise termination. Under the court of appeals' approach, whether a material breach of the franchise amounts to a constructive termination turns, as it did here, on application of *state* law. The material breach in this case was the breach of an alleged oral promise to continue the rent subsidy, despite a clause in the lease agreement (the "integration clause") that provided that the lease constituted the entire contract and that any amendments to it must be in writing. The court of appeals concluded that under Massachusetts law, "the question of integration is one of fact reserved for the trial judge" (Pet. App. 13a) and that the judge did not commit clear error in "conclud[ing] that the lease was not an integrated agreement." *Id.* at 14a. Thus, the very basis for respondents' claim that they were constructively terminated—that petitioners breached an oral promise that modified the lease—turned on an application of state law.

In seeking to establish a "uniform" (S. Rep. No. 731, at 19) and "federal" standard (*id.* at 15) for

the termination and non-renewal of petroleum franchise relationships, Congress could not possibly have intended to have the very determination of whether a termination occurred turn on application of state law. Under the court of appeals' approach, Congress' goal of uniformity will be utterly frustrated because the viability under the PMPA of a claim for constructive termination will vary from state to state depending on the application of state law.

The court of appeals' decision also misconstrues the scope of the PMPA. The text of the PMPA makes clear that a franchisor must actually terminate a franchise or notify the franchisee of its intent to terminate the franchise before a franchisee has a cognizable claim for wrongful termination. Read together, the provisions defining termination, identifying the permissible grounds for termination, and establishing the notification requirements that must attend termination provide no support for the court of appeals' recognition of a cause of action for alleged material breaches of the franchise that fall short of termination.

The court of appeals justified its departure from the text of the Act on the ground that requiring termination of the franchise would frustrate the "congressional plan" to protect franchisees' investment in their businesses. Pet. App. 18a. Aside from the fact that the text of the statute must control, the court's rationale ignores the remedial scheme Congress established, under which a franchisee threatened with actual termination may obtain a preliminary injunction compelling continuation of the franchise while a court examines

the grounds on which the franchisor intends to effect termination. Moreover, state law causes of action remain available (as they were here) to remedy alleged breaches of contract that do not involve actual termination of the franchise. By allowing franchisees to sue for breach of contract under the PMPA, the court of appeals has broadened the scope of the federal regime well beyond what Congress intended.

REASONS FOR GRANTING THE PETITION

I. Review Is Warranted To Restore The Uniformity Congress Sought To Establish By Enacting The PMPA.

Congress enacted the PMPA to establish a uniform, federal standard to govern the termination and non-renewal of petroleum franchise relationships. A uniform approach is crucial to the effective operation of the national market for motor fuel distribution. As we explain below, a conflict among the federal courts of appeals on the scope of the PMPA's cause of action for wrongful termination has frustrated Congress's intent to establish uniformity. In addition, the court of appeals' decision stands as an obstacle to achieving uniformity because under the approach it adopted, the determination whether a constructive termination under the PMPA has occurred hinges on the application of *state* law.

A. A Uniform Interpretation Of The PMPA Is Of Critical Importance To Franchisors.

In enacting the PMPA, Congress stressed the importance of establishing a "single, uniform set of rules" governing the termination and non-renewal of petroleum franchise relationships, which "permeate a nationwide motor fuel distribution and marketing network." S. Rep. No. 731, at 16. To achieve the goal of uniformity, Congress sought to replace the "uneven patchwork of rules governing franchise relationships which differ from state to state" (*id.* at 19) with a nationwide standard for termination and non-renewal of franchise relationships. Because refiners distribute their fuel nationwide, a uniform regulatory approach permits refiners to operate under a single set of rules, which promotes certainty and efficiency in their franchise relationships. The costs of dealing with unpredictable market conditions are compounded when the legal regime governing the termination and non-renewal of franchise relationships varies from one jurisdiction to another. The higher costs associated with an uncertain and non-uniform legal regime harm both franchisors and franchisees.

B. The Court Of Appeals' Decision Deepens A Circuit Conflict That Prevents The Attainment Of Uniformity.

Congress' goal of uniformity is being frustrated by a conflict among the federal courts of appeals over the scope of the PMPA's termination provisions.[5] In this case, the court of appeals held that respondents had a cause of action under the PMPA for wrongful termination despite the undisputed facts that respondents continued to operate their franchises without interruption and that petitioners neither terminated respondents' franchises nor notified respondents of an intent to terminate their franchises. Pet. App. 15a-21a. Instead, respondents claimed that petitioners breached oral promises to retain a rent subsidy program, a breach that amounted to a "constructive" termination because of the "financial hardship" it allegedly caused them. *Id.* at 21a.

Without attempting to ground the concept of constructive termination in the text of the Act, the court held that "the breach of the statutory element of the franchise"—be it the contract to use the refiner's trademark, the contract for the supply of motor fuel, or the lease of the premises—"does not have to be a total breach." *Id.* Rather, the court concluded that the breach need only constitute "a

---

[5] As petitioners note (Pet. 29), the federal circuits have also issued conflicting decisions pertaining to the scope of the PMPA's non-renewal provisions, further undermining the congressional goal of uniformity.

material change that . . . effectively ended the lease, even though the plaintiffs continued to operate the business." *Id.* The court acknowledged that the doctrine of constructive termination typically requires "an actual severance of the relationship" (*id.* at 18a), but reasoned that "requir[ing] an actual abandonment of years of work and investment before we recognize a right of action under the PMPA would be unreasonable." *Id.*

In holding that the PMPA provides a cause of action not only for actual termination of the franchise but also for material changes to one of the three agreements that comprise the franchise, the First Circuit relied on the Fourth Circuit's decision in *Barnes v. Gulf Oil Corp.*, 795 F.2d 358 (4th Cir. 1986). Pet. App. 16a-17a. In *Barnes*, the Fourth Circuit held that a franchisee that continued to operate its franchise but whose fuel costs increased when the franchisor assigned the franchise to a third party stated a claim for constructive termination under the Act. 795 F.2d at 362-363. The Fourth Circuit too failed to ground its holding in the text of the statute, relying instead on "Congress's purpose[]. . . to protect franchisees from overbearing, burdensome conduct by the franchisor during the term of the franchise." *Id.* at 362.

The Sixth Circuit rejected *Barnes* in *Clark v. BP Oil Co.*, 137 F.3d 386 (6th Cir. 1998). Observing that "[t]he PMPA does not exist to redress every breach of an agreement between a gasoline station franchisee and franchisor," *id.* at 391, the court held that a franchisee who continued to operate his franchise but who was charged more for fuel after the franchisor assigned the franchise to a third party

failed to state a claim for termination under the Act, *id.* at 391-392. The court explained that "even if [the franchisee] can establish a breach of the price term [of the franchise], it does not trigger the protections of the PMPA since he still retains use of BP's trademark, use of the Emerald-Mart premises, and continues to receive BP-branded motor fuel." *Id.* at 392.

The Ninth Circuit, like the Sixth Circuit, rejected a franchisee's claim for constructive termination based on an assignment that resulted in a higher charge for motor fuel in *Portland 76 Auto/Truck Plaza, Inc. v. Union Oil Co. of California*, 153 F.3d 938 (9th Cir. 1998). The Ninth Circuit "assume[d] for purposes of discussion, but d[id] not decide, that constructive termination may give rise to a claim under the Act." *Id.* at 948. The court then held that "[f]or the assignment to have amounted to a constructive termination, it would have had to force [the franchisee] out of its business." *Id.*[6]

---

[6] The Fifth Circuit "has not recognized a cause of action for 'constructive termination.'" *April Mktg. & Distrib. Corp., Inc. v. Diamond Shamrock Ref. and Mktg. Co.*, 103 F.3d 28, 29 (5th Cir. 1997) (concluding that, to the extent a constructive termination claim is cognizable under the PMPA, the franchisee must establish a "breach [of] the franchise"). In *McGinnis v. Star Enterprise*, 8 F.3d 20, 1993 WL 455587, at *4 (5th Cir. 1993) (unpublished opinion), the Fifth Circuit stated that "[t]he plain meaning of the [PMPA] does not provide for 'constructive termination.'" In *Abrams Shell v. Shell Oil Co.*, 343 F.3d 482 (5th Cir. 2003), the Fifth Circuit characterized the *McGinnis* statement as "*dicta*, and thus persuasive rather than binding" *id.* at 487, and, as in *April Marketing*, did not need to decide whether to recognize a constructive termination claim because (continued...)

Thus, under the current state of the law, respondents have a viable claim for constructive termination under the PMPA in the First and Fourth Circuits, but not in the Sixth or Ninth Circuits. Further review is warranted to resolve the circuit conflict because it denies franchisors and franchisees the uniform standards for termination and non-renewal that Congress sought to establish by enacting the PMPA.

C. The Court Of Appeals' Decision Stands As An Impediment To Uniformity Because Under Its Approach The Viability Of A Cause Of Action Under The PMPA For Constructive Termination Depends On State Law.

The court of appeals' decision undermines the establishment of a uniform federal standard for the termination of petroleum franchises. Under the court's approach, the determination whether a franchisee was constructively terminated within the meaning of the PMPA turns on the application of *state* law. This case is illustrative.

The basis for respondents' constructive termination claim is that petitioners breached an alleged oral promise to maintain a rent subsidy, notwithstanding a clause in the lease agreement providing that the lease constituted the entire contract and that any amendments to it must be in

---

the franchisees failed to allege a breach of "the three core components" of the franchise, *id.* at 488.

writing. Applying Massachusetts law, the district court permitted the jury "to consider what the parties said and did concerning the lease" including "actions prior to or contemporaneous with the execution of the written lease." Pet. App. 14a. Because Massachusetts reserves the determination of integration for the trial court as a question of fact, the court of appeals affirmed the district court's "conclu[sion] that the lease was not an integrated agreement" under Massachusetts law. *Id.* Thus, because Massachusetts law (as applied by the federal courts) permitted consideration of petitioners' alleged oral promises in the face of the integration clause, respondents could establish that petitioners committed a material breach of the franchise terms that amounted to a constructive termination under the PMPA. *See* 15 U.S.C. § 2805(c) ("[T]he franchisee shall have the burden of proving the termination of the franchise[.]").

Under the laws of some other states, by contrast, the integration clause in the lease would have been dispositive. Indeed, courts in Ohio and Florida, construing contract language identical to that at issue here, have read the integration clause as foreclosing evidence of alleged oral promises that the rent subsidy would be permanent. *See Casserlie v. Shell Oil Co.*, 2007 WL 1559510, at *7-8 (Ohio Ct. App. May 31, 2007), *appeal accepted for review*, No. 2007-1408, 876 N.E.2d 968 (Ohio Nov. 21, 2007); *Hazara Enterprises, Inc. v. Motiva Enterprises, LLC*, 126 F. Supp. 2d 1365, 1373-1374 (S.D. Fla. 2000). Other jurisdictions similarly give dispositive effect to a clear integration clause. *See, e.g., Tangren Family Trust v. Tangren*, 182 P.3d 326, 331 (Utah 2008)

("[W]e will not allow extrinsic evidence of a separate agreement to be considered on the question of integration in the face of a clear integration clause."); *Air Safety, Inc. v. Teachers Realty Corp.*, 706 N.E.2d. 882, 885 (Ill. 1999) ("[W]here parties formally include an integration clause in their contract, they are explicitly manifesting their intention to protect themselves against misinterpretations which might arise from extrinsic evidence."). In states applying such a rule, respondents could not have alleged constructive termination under the PMPA based on petitioners' breach of alleged oral promises made before or contemporaneous with the execution of the written lease.

By recognizing a cause of action under the PMPA for constructive termination, the court of appeals has allowed state law to determine whether the franchisor has effected a termination under the PMPA. Given Congress' objective to replace the "uneven patchwork of [state] rules" with a "single, uniform set of rules" governing termination of petroleum franchises, S. Rep. No. 731, at 19, that result could not possibly be what Congress intended.

II. Review Is Warranted Because The PMPA Does Not Create A Cause Of Action For Constructive Termination.

The PMPA does not provide a cause of action for constructive termination. In recognizing a cause of action under the PMPA for material changes to the franchise that are harmful to the franchisee, the court of appeals departed from the text of the Act, which creates a cause of action for wrongful termination only in cases where the franchisor has

actually terminated the franchisee or notified the franchisee of its intent to do so.

To begin with, the PMPA defines the term "termination" to include "cancellation." 15 U.S.C. § 2801(17). If Congress had intended the term to cover a much broader range of conduct that is not commonly understood as termination, such as material changes to the franchise terms, it is fair to assume Congress would have said so. Moreover, the provisions governing the grounds for termination and the notification requirements confirm that the PMPA provides a remedy only for actual termination of the franchise.

The PMPA enumerates several grounds on which a franchisor may lawfully terminate the franchise. *See* 15 U.S.C. § 2802(b)(2)(A) (franchisor may terminate franchise if franchisee fails to comply with a reasonable and materially significant franchise term); *id.* § 2802(b)(2)(B) (franchisor may terminate franchise if franchisee does not "exert good faith efforts to carry out the provisions of the franchise"); *id.* § 2802(b)(2)(C) (franchisor may terminate franchise based on occurrence of an event relevant to the franchise relationship and which renders termination reasonable, provided the event occurred while the franchise was still in effect); *id.* § 2802(b)(2)(D) (franchisor may terminate franchise based on written agreement between the franchisor and franchisee to terminate the franchise); *id.* § 2802(b)(2)(E) (franchisor may terminate franchise based on good-faith determination in the normal course of business to withdraw from the marketing of motor fuel through retail outlets in the relevant geographic market). These provisions contemplate

an *actual* termination of the franchise relationship and provide justifications for it.

The PMPA also contains a highly structured notice procedure that presupposes that termination under the Act means actual termination of the franchise, not merely a material change in terms that imposes financial hardship on the franchisee. The PMPA generally requires the franchisor to provide written notice of its intent to terminate the franchise at least "90 days prior to the date on which such termination or nonrenewal takes effect." 15 U.S.C. § 2804(a)(2). If a franchisor actually terminates the franchise without providing the requisite notice, the franchisee may sue under the PMPA for a violation of Section 2802. *See id.* § 2805(a); *id.* § 2802(b)(1)(A). Under the court of appeals' rule that a claim for constructive termination lies where a breach of a franchise term is serious enough to "effectively end[] the lease, even though the plaintiffs continued to operate the business" (Pet. App. 18a), the notice requirement becomes unworkable, because the franchisor will not necessarily know whether or when a change in the franchise terms will "effectively [but not actually] end[] the lease." *Id.* The notice provisions thus operate together with the provisions setting out the legitimate grounds for termination to regulate the *actual* termination of a franchise, not mere changes to the franchise that have an adverse effect on the franchisee.

The PMPA provides a cause of action against franchisors that "fail[] to comply with the

requirements of section 2802." 15 U.S.C. § 2805(a).[7] As discussed above, Section 2802 is concerned exclusively with a decision by a franchisor to sever its relationship with the franchisee either through actual termination or non-renewal of the franchise relationship. Because Section 2805(a) cross-references Section 2802 to define the cause of action, the scope of the remedy in Section 2805(a) for termination or non-renewal is necessarily limited to the scope of the requirements set out in Section 2802. The cause of action that Section 2805(a) creates for failure to comply with the termination provisions thus extends only to the actual termination of a franchise that the franchisee contends was not justified by the grounds enumerated in Section 2802. It does not encompass the claim here that petitioners breached the rent term of the lease. *See Abrams Shell v. Shell Oil Co.*, 216 F. Supp. 2d 634, 639 (S.D. Tex. 2002) (rejecting constructive termination theory under the PMPA "because it conflicts with the PMPA's remedial scheme"), *aff'd*, 343 F.3d 482 (5th Cir. 2003); *cf. Dersch Energies, Inc. v. Shell Oil Co.* 314 F.3d 846, 860 (7th Cir. 2002) ("Because [the franchisee] does not argue that the defendants' alleged violation of [the Act] resulted in the nonrenewal of a lease of retail premises, motor fuel supply contract, or the contract to use the Shell trademark in connection with retail sales, it cannot

---

[7] The PMPA also provides a cause of action against a franchisor that fails to comply with the requirements of Section 2803. That Section, which provides special rules for "[t]rial and interim franchises," 15 U.S.C. § 2803, is not at issue here.

demonstrate the nonrenewal of the franchise relationship within the meaning of the PMPA.").

The court of appeals justified its atextual reading of the statute on the ground that "[t]he congressional plan would be frustrated by requiring a franchisee to go out of business before invoking the protections of the PMPA," Pet. App. 18a (internal quotation marks omitted). *See also* Petition for a Writ of Certiorari, *Mac's Shell Service, Inc., et al. v. Shell Oil Prods., Inc., et al.*, No. 08-240, 2008 WL 3919440, at *20 (plaintiffs argue that franchisees should not be "forced to choose between accepting an unlawful and coercive contract in order to stay in business and rejecting it and going out of business in order to preserve a cause of action"). But the PMPA includes provisions that protect franchisees from having to choose between challenging a franchisor's policies or continuing the franchise. Those provisions impose notice requirements on franchisors who intend to terminate the franchise, 15 U.S.C. § 2804, and permit franchisees to file suit and obtain a preliminary injunction compelling "continuation or renewal of the franchise relationship" while the merits of the franchisee's challenge are being litigated. 15 U.S.C. § 2805(b). Congress even relaxed the traditional equitable standards, requiring the granting of a preliminary injunction on a franchisee's showing merely that "there exist sufficiently serious questions going to the merits to make such questions a fair ground for litigation" and that the balance of hardships tips in its favor. *Id.* § 2805(b)(2).

As the Seventh Circuit has explained, the PMPA's notice requirements, together with the

"lenient standard" for injunctive relief, "protect[] franchisees not only from arbitrary and discriminatory termination or nonrenewal, but also from the harmful effects of threatened termination or nonrenewal." *Dersch*, 314 F.3d at 863. That is so because under the Act, "a district court is required to issue an injunction to protect the franchisee's economic interests during the pendency of the case" if the franchisee meets the Act's "lenient standard." *Id.* at 865.

The remedial scheme Congress established thus provides a means for franchisees to protect their franchises while challenging a planned termination or non-renewal without "creat[ing] a federal common law for governing petroleum franchise agreements." *Dersch*, 314 F.3d at 861-862. Moreover, state law causes of action remain available to protect franchisees that allege that the franchisor committed a breach of contract that does not amount to an actual termination of the franchise. Indeed, in this very case, respondents brought state law causes of action that were duplicative of their PMPA claims. *See* Pet. App. 37a (Judgment ¶ 2(v)) ("Because plaintiff's claims under Count II (Violation of the PMPA based on Constructive Termination of the franchise relationship) and under Count V (Breach of the Lease) sought the same damages for loss of the STIP subsidy and lost business value and the jury awarded the same damages, plaintiff is entitled to recover as to those two awards only once."); *id.* at 39a; 40a; 42a; 44a; 46a; 48a; 50a; 52a. The text of the PMPA provides no support for the court of appeals' recognition of a cause of action for alleged material breaches of the franchise that do not result

in termination, a holding that federalizes ordinary breach of contract claims that are the traditional province of state law.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

HARRY M. NG
KRISTYN NOETH
American Petroleum Institute
1220 L Street N.W.
Washington, DC 20005
(202) 682-8000

ROBERT A. LONG, JR.
Counsel of Record
JONATHAN L. MARCUS
Covington & Burling LLP
1201 Pennsylvania Ave., NW
Washington, DC 20001
(202) 662-6000

October 2008

Counsel for Amicus Curiae